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Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

THE SINGER COMPANY,

Petitioner,

—against—

GEORGE B. GREENE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

THE SINGER COMPANY,

Petitioner,

—against—

GEORGE B. GREENE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner seeks a writ of certiorari to review a Judgment of the United States Court of Appeals for the Third Circuit affirming an Order of the United States District Court for the District of New Jersey which refused to prohibit one of Petitioner's former attorneys, Rankin A. Milliken, Esquire, from assisting Respondent and his representatives in the litigation of this case.

Opinions Below

The opinion of the District Court (Whipple, J.) is unreported and is printed as Appendix A, pp. A1-A10, *infra*. The letter opinion of the District Court dated June 30, 1971 is unreported and is printed as Appendix B, pp. A11-A13, *infra*. The Order of the District Court is printed as Appendix C, pp. A14-A16, *infra*.

The opinion of the Court of Appeals upon Respondent's motion to dismiss the appeal is unreported and is printed

as Appendix D, pp. A17-A20, *infra*. The opinion of the Court of Appeals upon the appeal is unreported and is printed as Appendix E, pp. A21-A22, *infra*. The Judgment of the Court of Appeals affirming the Order of the District Court is printed as Appendix F, pp. A23-A24, *infra*. The majority and dissenting opinions of the Court of Appeals on Petitioner's Petition for Rehearing In Banc are printed as Appendix G, pp. A25-A28, *infra*.

Jurisdiction

The Judgment of the Court of Appeals affirming the Order of the District Court is dated and was entered March 13, 1972 and the Order of the Court of Appeals denying Petitioner's timely Petition for Rehearing In Banc is dated and was entered May 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

Questions Presented

(A) Should an attorney who has represented one party be disqualified from subsequent representation of the adverse party in a suit substantially related to the subject matter of the former representation?

(B) Should this Court exercise its inherent power of supervision in order to consider the Third Circuit's new appellate standard of "permissible discretion" in refusing to disqualify an attorney who has switched allegiance?

Canons of Ethics and Disciplinary Rules Involved

The Canon of Professional Ethics of the American Bar Association involved is Canon 6. It appears in Appendix to Part I, Rules Governing the New Jersey Courts (1968 ed.) and was incorporated by reference in former Rule 6 of the General Rules of the United States District Court for the District of New Jersey. The text of Canon 6 is printed as Appendix H, p. A29, *infra*.

The Canons and Disciplinary Rules of the Code of Professional Responsibility of the American Bar Association involved are Canons 4 and 5 and Disciplinary Rules 4-101 and 5-105. These Disciplinary Rules appear in Appendix to Part I, Rules Governing the New Jersey Courts (1969 Revision, as amended) and are incorporated by reference in Rule 6 of the General Rules of the United States District Court for the District of New Jersey. The texts of these Canons and Rules are printed as Appendix I, pp. A30-A32, *infra*.

Statement of the Case

In his Complaint filed October 30, 1970, Respondent, George B. Greene, alleges in substance that Petitioner, The Singer Company ("Singer"), fraudulently obtained inventions from him in 1964 and 1965 which it improperly used in connection with the speeding up of an automatic typewriter it marketed under the name "Flexowriter." Respondent further alleges that these acts constitute (i) unfair competition, (ii) violations of the antitrust laws, and (iii) patent infringement. Federal jurisdiction in the court of first instance rests upon 28 U.S.C. §§ 1338(a)-(b)

(1970), 15 U.S.C. § 15 (1970), 28 U.S.C. § 1332 (1970) and pendent jurisdiction.

The substantive issues of this lawsuit are intimately related to the professional services performed by Rankin A. Milliken, Esquire, in his capacity as a patent attorney for Singer or its predecessor Friden, Inc. from June 1, 1962 to November 30, 1965.* From May, 1964 through November, 1965, Friden, Inc. and Mr. Greene cooperated in a program of joint research and Mr. Milliken rendered professional services as Friden's counsel in that connection.

Notwithstanding this past professional relationship, Mr. Milliken has chosen to serve as patent attorney for Mr. Greene in this lawsuit.

Promptly after learning of Mr. Milliken's participation in this case, Singer obtained an Order requiring Mr. Greene and Mr. Milliken to show cause why Mr. Milliken should not be prohibited from assisting Mr. Greene and his representatives in any way whatsoever in the litigation of this case.

In its Opinion, filed June 14, 1971, the District Court made the following findings with respect to Mr. Milliken:

> a. Mr. Milliken had been one of Singer's patent attorneys during the period involved in this suit (*e.g.*, findings 2 and 10) (App. A, pp. A3, A4).
>
> b. Some of Mr. Milliken's work at Singer was "included in the subject matter of the present suit" (*e.g.*, findings 8, 9 and 11) (App. A, p. A4).

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* Singer acquired Friden, Inc. in 1963.

c. From the beginning, Mr. Milliken has been assisting Mr. Greene in this suit (finding 15) (App. A, p. A5).

In spite of these express findings, the District Court denied Singer's application to disqualify Mr. Milliken. Instead the District Court merely imposed limited restrictions in an attempt to prevent Mr. Milliken from revealing any confidential information which he had not already disclosed to Mr. Greene while he was an attorney for Singer (App. C, p. A15). The District Court declined to disqualify Mr. Milliken *only* because the Court could not find that Singer had communicated to Mr. Milliken information relating to this suit which was meant to be kept confidential from Mr. Greene (App. A, p. A6).

Singer appealed to the Court of Appeals. On November 2, 1971, the Court (Van Dusen, Aldisert and Gibbons, JJ.) held that the Order of the District Court refusing to disqualify Mr. Milliken was appealable as of right pursuant to 28 U.S.C. § 1291 (1970) (App. D, pp. A17-A20).

On March 13, 1972 the Court of Appeals (Kalodner, Hastie and Rosenn, JJ.) in a six sentence *per curiam* opinion offered the following as the sole basis for affirming the Order of the District Court:

> "On review of the records we are unable to say that the District Court abused its *permissible discretion* in its Order." (App. E, p. A22) (emphasis added).

On April 3, 1972 Singer filed a Petition for Rehearing In Banc which was denied on May 10, 1972. However, three judges (Adams, Van Dusen and Gibbons, JJ.) filed a vigorous dissent concluding:

> " • • • because an important question of legal ethics is implicated, I respectfully suggest that the court en banc should have considered the crucial issues involved. This would seem particularly appropriate at the present time when so many charges have been made concerning moral and ethical considerations affecting the bar." (App. G, p. A28).

This Petition for a Writ of Certiorari followed.

Reasons for Granting the Writ

The Court should now review and reverse the decision of the Court of Appeals because:

a. The Court of Appeals' application of a standard of "permissible discretion" in affirming the District Court's Order refusing to disqualify an attorney who has switched allegiance not only conflicts with decisions of other courts of appeals and other applicable authority but also rewards and encourages unethical conduct.

b. If the District Court's Order is permitted to stand, Singer will suffer irreparable injury because its former attorney will be actively counseling Plaintiff at all stages of this proceeding.

A.

The Court of Appeals' Application of a Standard of "Permissible Discretion" in Affirming the District Court's Order Refusing to Disqualify an Attorney Who Has Switched Allegiance Not Only Conflicts With Decisions of Other Courts of Appeals and Other Applicable Authority But Also Rewards and Encourages Unethical Conduct.

1. *The Holdings Below Are in Conflict With Decisions of Other Courts of Appeals and Other Applicable Authority.*

Prior to the decisions in this suit, the authorities were in agreement that an attorney who has represented one party must be disqualified from subsequent representation of the adverse party in any matter substantially related to the former representation.* *American Can Co.* v. *Citrus Feed Co.*, 436 F.2d 1125 (5th Cir. 1971); *Chugach Elec. Ass'n* v. *United States D. C. for Dist. of Alaska*, 370 F.2d 441 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967); *Consolidated Theatres, Inc.* v. *Warner Bros. Circuit Management Corp.*, 216 F.2d 920 (2d Cir. 1954); *E. F. Hutton & Co.* v. *Brown*, 305 F. Supp. 371 (S.D. Tex. 1969); *T. C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953). As the Second Circuit stated in *Consolidated Theatres, Inc., supra*:

> "'• • • • The former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of ac-

* Disqualification of an attorney by a district court is a question of federal law. *See Cord* v. *Smith*, 338 F.2d 516, 524 (9th Cir. 1964).

> tion wherein the attorney previously represented him, the former client.'" *

In view of the fact that the District Court below specifically found (i) that Mr. Milliken had been one of Singer's patent attorneys during the period involved in this suit, (ii) that some of his work at Singer "included the subject matter of the present suit" and (iii) that from the beginning he has been assisting Mr. Greene in this suit, the District Court erred in refusing to disqualify Mr. Milliken.

The District Court's refusal to find a Canon 6** violation was predicated on the absence of a showing of disclosure of confidential information by Singer to Mr. Milliken. Courts have repeatedly emphasized, however, that the absence of a disclosure of confidential information *cannot* bar a finding of a Canon 6 violation. *Chugach Elec. Ass'n* v. *United States D. C. for Dist. of Alaska*, 370 F.2d 441 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967); *Cord* v. *Smith*, 338 F.2d 516, 524 (9th Cir. 1964); *Consolidated Theatres, Inc.* v. *Warner Bros. Circuit Management Corp.*, 216 F.2d 920, 924-925 (2d Cir. 1954); *E. F. Hutton & Co.* v. *Brown*, 305 F. Supp. 371 (S.D. Tex. 1969); *Marco* v. *Dulles*, 169 F. Supp. 622, 629 (S.D.N.Y. 1959), *appeal dismissed*, 268 F.2d 192 (2d Cir. 1959); *Empire Linotype School* v. *United States*, 143 F. Supp. 627, 632 (S.D.N.Y. 1956); *United States* v. *Standard Oil Co.*, 136 F. Supp. 345, 354 (S.D.

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* 216 F.2d at 924, *citing*, *T. C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, *supra*, 113 F. Supp. at 268.

** Although this Petition refers to Canon 6 of the ABA Canons of Professional Ethics, the ABA Code of Professional Responsibility, which has been widely adopted subsequent to the events in question, compels the same conclusions. *See* ABA Code of Professional Responsibility Canons 4 and 5 and Disciplinary Rules 4-101 and 5-105 thereunder (App. I, pp. A30-A32).

N.Y. 1955); *T. C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268-269 (S.D.N.Y. 1953). As the Ninth Circuit stated in *Cord* v. *Smith, supra*:

> "In our opinion, the rule that an attorney who has represented one party in a transaction may not thereafter represent the other party in an action against his former client, arising out of or closely relating to the transaction, does not depend for its operation upon a subsidiary decision as to whether the attorney would or might be using or misusing confidential information derived from his former client." *

The Court of Appeals compounded the error of the District Court not only by accepting the District Court's holding that a disclosure of confidential information is a prerequisite for a Canon 6 violation, but, more importantly, by holding that the District Court had "permissible discretion" to allow adverse representation by an attorney against his former client. No case or authority has ever suggested that there exists any area of "permissible discretion" to refuse disqualification once a substantial relationship between the former and subsequent representation has been found.

2. *Application of a Standard of "Permissible Discretion" Both Condones the Appearance of Professional Impropriety and Encourages Actual Misconduct.*

The Third Circuit's substitution of a standard of "permissible discretion" in lieu of the mandatory disqualification rule will have a serious and damaging impact on the rules governing the legal profession. To allow attorneys to switch allegiance and represent interests adverse to

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* 338 F.2d at 524.

their former clients will undermine public respect for the legal profession.

The importance of maintaining confidence in the legal profession cannot be overstated. Canon 9 of the Code of Professional Responsibility codifies the well established principle that "a lawyer should avoid even the appearance of professional impropriety". As the Standing Committee on Professional Ethics of the American Bar Association stated:

> "[T]he lawyer should avoid representation of a party in a suit against a former client, where there may be the appearance of a conflict of interest or a possible violation of confidence, *even though this may not be true in fact.*" ABA Comm. on Professional Ethics, Informal Opinion 885 at 3 (1965) (emphasis added); *see* H. Drinker, *Legal Ethics* 103-129 (1953).

The appearance of professional impropriety alone precludes an attorney from representing a subsequent adverse interest regardless of his good faith or lack of actual misconduct. *Chugach Elec. Ass'n* v. *United States D. C. for Dist. of Alaska*, 370 F.2d 441, 442 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967); *United States* v. *Trafficante*, 328 F.2d 117, 120 (5th Cir. 1964); *W. E. Bassett Co.* v. *H. C. Cook Co.*, 302 F.2d 268, 269 (2d Cir. 1962). For example, after finding that an attorney had not been guilty of any intentional wrongdoing, the Fifth Circuit in *United States* v. *Trafficante, supra*, disqualified him from representing a subsequent adverse interest, stating:

> "The Preamble to the Canons of Ethics admonishes the members of the bar that their conduct should be such as to merit the approval of all good men. That

> conduct should not be weighed with hairsplitting nicety. We have found no exceptions to the exhortation to 'abstain from all appearance of evil.' 1 Thessalonians 5:22." *

In addition to condoning the appearance of professional impropriety, the Third Circuit's new standard will in fact encourage actual impropriety. Unscrupulous counsel may henceforth engage in unethical conduct with the knowledge that such conduct will merely be subject to the vagaries of "permissible discretion".** At a time when the legal profession is being criticized as never before, when the media ring with charges of professional impropriety by lawyers, any ruling which will reward and encourage such conduct should not be allowed to stand.

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* 328 F.2d at 120.

** The seriousness with which this kind of conduct is viewed is suggested by the fact that were a former government attorney involved in a suit against the United States, sanctions could be imposed under 18 U.S.C. § 207(a) (1970) of $10,000 or imprisonment for not more than two years, or both.

B.

If the District Court's Order Is Permitted to Stand, Singer Will Suffer Irreparable Injury Because Its Former Attorney Will Be Actively Counseling Plaintiff at All Stages of This Proceeding.

Not only will the legal profession be tainted if the "permissible discretion" standard is permitted to stand, but Singer and all former clients similarly situated will suffer irreparable injury. As the Third Circuit recognized in holding that the Order of the District Court was appealable as of right pursuant to 28 U.S.C. § 1291 (1970):

> "If, upon post-trial review, it were held that the safeguards imposed by the district court were too fragile to protect threatened interests, there could be damage inflicted upon the litigant for which the law would provide no practical remedy." *Greene* v. *Singer*, Slip Opinion at 3 (3d Cir., filed Nov. 2, 1971); (App. D, p. A19).

The safeguards imposed are clearly too fragile to protect Singer's interests:

1. There is the danger that Mr. Milliken will convey to Mr. Greene particular items of confidential information as the case proceeds through the inspection of hundreds of thousands of documents, the depositions of witnesses, the preparation for trial and the trial itself.

2. Of equal, if not greater, significance than specific items of confidential information is the general information which Mr. Milliken is in a position to convey which he obtained as a result of his years as a patent attorney for

Singer.* This confronts Mr. Milliken with the problem of "unconscious betrayal" referred to in *United States* v. *Standard Oil Co.*, 136 F. Supp. 345, 353 n. 10 (S.D.N.Y. 1955).

3. The Order cannot be policed because it is highly unlikely that Singer would ever be able to ascertain whether information was conveyed.

The Order of the District Court does not eliminate the impending irreparable injury. Singer remains confronted with the prospect of defending a major lawsuit in which its adversary will be actively assisted by the very lawyer in whom Singer placed confidence with regard to the subject matter of this suit.

Conclusion

The decision below has cast the attorney's duty of loyalty to his former client into a state of intolerable confusion and is in conflict with the decisions of other Courts of Appeals and other applicable authority.

If this Court exercises its supervisory authority, public confidence in the legal profession will be strengthened, attorneys will not be rewarded and encouraged for unethical conduct, and former clients will not be threatened with the risk of irreparable injury.

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* Mr. Milliken worked in the intimate surroundings of a five-man corporate patent department and had the confidence of all of the other attorneys as well as access to all of the files and other confidential information of the department.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the District Court on Defendant's Motion to Prohibit Rankin A. Milliken, Esq. From Assisting Plaintiff and His Representatives in Any Way Whatsoever in the Litigation of This Suit

June 14, 1971

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 1467-70

GEORGE B. GREENE,

Plaintiff,

v.

THE SINGER COMPANY, a corporation of the State of New Jersey,

Defendant.

On Defendant's Motion to Prohibit Rankin A. Milliken, Esq. from Assisting Plaintiff and His Representatives in Any Way Whatsoever in the Litigation of This Suit.

OPINION

APPEARANCES:

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RIKER, DANZIG, SCHERER & BROWN, Esqs.

By: DICKINSON R. DEBEVOISE, Esq.
THOMAS E. COLLETON, JR., Esq.
Attorneys for defendant

WHIPPLE, District Judge:

Plaintiff, George B. Greene, (Greene) through his attorney, David R. Simon, filed this suit against defendant, Singer Company, (Singer) in late 1970, charging Singer with fraudulently misusing confidential information obtained from Greene pursuant to agreements entered into by Greene and Singer in 1964. In addition Greene charges Singer with various violations of the anti-trust laws. Greene is an inventor who has been very successful at designing and improving electric typewriters. All controversies in this suit concern Greene's various inventions in the field of electric typewriters.

After voluminous discovery papers had been served, but before the requested information had been exchanged, Singer brought this motion seeking to prohibit Rankin A. Milliken, Esq., Greene's present patent attorney and formerly an employee of Friden, Inc. (a division of Singer) from assisting Greene in any way relating to the subject matter of this litigation. The Court has received a num-

ber of affidavits, briefs have been submitted, and oral argument has been heard. The Court makes the following findings of fact:

(1) Rankin A. Milliken is a member of the Virginia Bar and the Bar of the District Court of the District of Columbia, and is registered to practice before the United States Patent Office.

(2) Milliken was employed by Friden on June 1, 1962 as a patent attorney in the office of the Chief Patent Attorney, Robyn Wilcox, at San Leandro, California. He continued in such employment, at first with Friden and then Singer, until November 30, 1965.

(3) As a patent attorney Milliken entered into an Employment Agreement with Friden dated October 28, 1963. That agreement provides, among other things, for the protection of "confidential information" acquired by Milliken while employed by Friden.

(4) In 1963 Friden was acquired by Singer, and in 1968 was merged into and became a division of Singer.

(5) Friden's San Leandro plant was engaged in the development and sale of calculating machines, accounting machines, computers, and similar devices. This plant was also responsible for handling research undertaken in conjunction with Greene.

(6) Friden's Rochester, New York plant was engaged in the development and sale of automatic typewriters. As part of this responsibility, this plant was, and for many years has been, working on various devices and arrangements to increase the speed of the Flexowriter, an automatic tape controlled typewriter.

(7) The daily patent work in Rochester in 1964 and 1965 was performed by a Resident Patent Attorney or Agent located in Rochester, New York. Milliken had no responsibilities whatsoever with respect to the patent work performed in the Rochester plant.

(8) Pursuant to written agreements dated May 6, 1964, May 22, 1964 and November 1, 1964, Friden and Greene, individually and doing business as Greene Engineering Co., entered into agreements concerning Greene's work in developing improvements in electric typewriters. Under the agreement, Greene undertook, among other things, to attempt to develop devices that could be used by Friden in manufacturing electric typewriters. Any patent applications on such devices were to be prosecuted by patent attorneys employed by Friden. All inventions were to be disclosed to such patent attorneys.

(9) Milliken was designated by Friden to act as such patent attorney, and he was authorized and directed to receive disclosures and file any applications for patents. Milliken continued in that assignment until November of 1965 when he left the employ of Friden.

(10) At all times during his employment, including the period he was assigned to act under the Agreement, Milliken reported to, and was responsible to, the Chief Patent Attorney of Friden, Robyn Wilcox, and was one of five patent attorneys employed in San Leandro.

(11) During the period from May 1964 to November 1965, Milliken filed several patent applications for Greene, including United States Patent Application Serial No. 404,246, which is included in the subject matter of the present suit.

(12) Milliken denies that any of the wrongful or fraudulent acts of Friden alleged in the complaint came to his attention while he was employed by Friden.

(13) Milliken is presently principal attorney to Greene in Interference No. 96,639 involving United States Patent No. 3,340,987, which forms part of the subject matter of the present action. Mr. Simon is Milliken's associate in that matter. Singer filed a motion objecting to Milliken's appearance in that matter, but early in 1970 the motion was withdrawn.

(14) On February 25, 1971 Milliken and Simon appeared at the offices of Singer's general counsel in New York City for the purpose of inspecting the thousands of documents which had been assembled pursuant to Greene's request by order of this Court. Milliken was refused permission to inspect any documents, and Singer contends that was their first notice that Milliken was in any way involved in the present case.

(15) Simon has represented to the Court that Milliken has been involved in this litigation from the beginning, but his role is limited to "assisting us in the patent phases of the case."

From an examination of the facts as they appear in this case, it is clear that Milliken was an employee of Friden from May 6, 1964 to November 1965 and that during that time he was closely associated with Greene and, in fact, was assigned by Friden to work on Greene patent matters. Singer urges that by representing Greene now, Milliken is acting in violation of Canon 6 of the Canons of Professional Ethics formulated by the American Bar Association and adopted by this Court (Local Rule 6), New Jersey,

(Rule 1:14, Rules Governing the Courts of the State of New Jersey) Virginia, and by implication the United States Patent Office (Rule 344, 37 C.F.R. § 1.344) provides in part:

> "It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.
>
> The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

Based on the facts presently before me I decline to find any specific violation of the above Canon, because an examination of the Complaint in this case and the work history of Milliken does not make it at all clear, what, if any, confidential information Milliken may have obtained from Singer is part of the subject matter of this litigation. Even though Milliken was employed by Friden not Greene, the fact remains that the interests of Greene and Friden were not of an adverse nature. However, while these interests may not have been adverse at that time, that fact does not license Milliken to convey to others information he received only because he was Friden's employee. Since a great deal of information was by agreement conveyed to Greene that material cannot be part of any prohibition. The material under prohibition is information, ideas, etc. which Milliken

came to know *only* because of his relationship with Friden, and which was *not* communicated to Greene during the period when Milliken was still with Friden and was obligated to communicate such things to Greene. This is the material which concerns the Court. If Milliken has communicated information of this sort, then the Court must act. In like manner Milliken may not communicate to others any information reasonably calculated to lead to the discovery of material which he may not have had access to, but the source of which was known through his employment relationship with Friden.

Greene argues against any restraints because of Singer's alleged failure to object to Milliken's appearance in the Interference matter. While this position is not without merit, it is apparent from the face of the Complaint that although both the present case and the interference involve intertwined issues, the Complaint before me is much broader. In addition, the withdrawal of the motion in the interference action was made many months prior to the institution of this suit. It is difficult to conclude that the waiver in the interference action was made with the knowledge or understanding that it would also apply to a future claim of much broader terms in an unrelated court.

Greene also challenges the jurisdiction of this Court to make any order affecting Milliken since he is not a resident of this district, not a member of the bar of this district, and has not taken part in any phase of this litigation while present in this district. However, I conclude that he has taken an active part in this litigation, albeit not in this district. He has appeared with Greene's counsel to inspect documents and by Simon's own admission he is assisting in the "patent aspects" of the case. Since the whole case is inextricably bound up with "patent matters," it must be assumed that Milliken's role is not minor nor will it be

limited to the early stages of the case. As such Milliken has been practicing law before this Court.[1]

In addition to his role in this litigation, Milliken has submitted several affidavits on the merits of his position regarding this motion. Greene's counsel has attempted to preserve the question of jurisdiction, but Milliken himself has seen fit to attack the merits.

Even though this Court's jurisdiction over Milliken may be questioned, the same arguments could not be raised as to Mr. Simon who is presently before the Court. Certainly, there is no question as to this Court's authority to regulate the practice of law of those who appear before it.[2] and any order entered should include a prohibition against Mr. Simon requesting or receiving any information from Milliken which is subject to the order.

It is this Court's opinion than an appropriate order should be entered which prohibits Milliken from in any way disclosing, using or providing access to confidential information received by way of his employment with Friden, and which was not disclosed to Greene pursuant to written agreements during the 1964-65 period when Milliken was an employee of Friden. Such an order is limited, but the proofs established to date are not sufficient to bar Milliken from any connection with this case, especially since many of the charges stem from alleged acts of Friden done after Milliken ceased to be their employee. In all future aspects of this case Singer will continue to have the burden of proving and Milliken, through Greene, will always have

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[1] *E. P. Hutton & Co.* v. *Brown*, 305 F.Supp. 371 (S.D. Texas 1969).

[2] *Sanders* v. *Russell*, 410 F.2d 241 (5th Cir. 1968); *Cord* v. *Smith*, 338 F.2d 516 (9th Cir. 1964), mandate clarified, 370 F.2d 418 (9th Cir. 1966); *In re Fletcher*, 71 App. D.C. 108, 107 F.2d 666, cert. denied 309 U.S. 664 (1939).

the duty to defend charges that evidence which comes to light was obtained by Milliken, solely as a result of his employment with Friden, and of a confidential nature not previously disclosed to Greene during the 1964-65 period. Any evidence which is found to be so "tainted" will not be considered suitable for submission to the jury.

Submit an appropriate order in conformity with the foregoing.

LAWRENCE A. WHIPPLE
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 1467-70

GEORGE B. GREENE,

Plaintiff,

v.

THE SINGER COMPANY, a corporation of the State of New Jersey,

Defendant.

OPINION

LAWRENCE A. WHIPPLE
U.S.D.J.

FILED: JUNE 14, 1971

APPENDIX B

Letter Opinion of the District Court on Defendant's Request for Reargument

June 30, 1971

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

NEWARK, N. J. 07101

CHAMBERS OF
LAWRENCE A. WHIPPLE
JUDGE

June 30, 1971

Simon & Allen, Esqs.
744 Broad Street
Newark, N. J. 07102
Attn: David R. Simon, Esq.

Riker, Danzig, Scherer & Brown, Esqs.
744 Broad Street
Newark, N. J. 07102
Attn: Dickinson R. Debevoise, Esq.

Re: Greene v. Singer
Civil Action No. 1467-70
Request for Reargument of Singer's Application to bar Rankin N. Milliken, Esq. from participating in any way in this litigation.

Gentlemen:

I have carefully considered Singer's request to reargue its application to prohibit Rankin A. Milliken, Esq. from

participating in any way in the present litigation. Even though I am denying the request for reargument, in view of the questions raised by Singer's letter, I feel some clarification of my opinion may be useful to counsel.

Singer argues that my prior opinion in this matter "appears to be irreconcilable with the language of Canon 6 and the controlling federal cases." The language, of course, refers to the representation of an adverse interest and the controlling cases refer to *E. F. Hutton & Co.* v. *Brown*, 305 F.Supp. 371 (S.D. Texas 1969) and *Cord* v. *Smith*, 338 F.2d 516 (9th Cir. 1964). Even a cursory examination of those cases reveals that the nature of the prior legal representation there is not even analogous to the 1964-1965 Friden-Milliken-Greene relationship. It is the uniqueness of this relationship which led me to conclude that the interests of Greene and Milliken today are not sufficiently adverse to the interest of Milliken and Friden in 1964-1965 to justify barring Milliken from assisting Greene in any way in this suit.

The essential element which distinguishes the present case from those cited by Singer is the fact that Greene specifically contracted for unlimited free legal service for his own benefit to be provided by Friden.[1] In an indirect way Greene purchased legal work from Friden, but instead of paying cash, the parties negotiated this term as part of the overall scheme of the agreements. This Court can take judicial notice of the fact that the cost of filing patent applications and the legal work associated therewith is substantial. Despite what the *quid pro quo* might have been the fact remains that it was Friden who placed Milliken

[1] Affidavit of Robyn Wilcox, para. 7; Agreements between Greene and Friden dated May 6, 1964 and November 1, 1964.

in the awkward position of representing a client who had contracted with his employer for legal services. As a result it is very difficult to see why this Court should deprive Greene, who negotiated for these services, the opportunity to consult with the attorney who was assigned to provide them. This, of course, only relates to those matters where Milliken was acting with regard to Greene's interests. Such consultation does not come within the ambit of Canon 6.

Turning to the other aspects of Milliken's relationship to Friden, I feel I have adequately protected Singer's identifiable interests as set forth in my opinion. The order submitted to the Court by Singer has been signed and filed with the Clerk of the Court today.

Very truly yours,

/s/Lawrence A. Whipple

Lawrence A. Whipple
U.S.D.J.

LAW:pr

Original filed with the Clerk of the Court.

APPENDIX C

Order of the District Court on Defendant's Motion to Prohibit Rankin A. Milliken, Esq. From Assisting Plaintiff and His Representatives in Any Way Whatsoever in the Litigation of This Suit

June 30, 1971

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 1467-70

GEORGE B. GREENE,

Plaintiff,

—v.—

THE SINGER COMPANY, a corporation of the State of New Jersey,

Defendant.

ORDER

On Defendant's Motion to Prohibit Rankin A. Milliken, Esq., from Assisting Plaintiff and his Representatives in any way whatsoever in the Litigation of This Suit.

This matter having been opened to the Court on application of Defendant to prohibit Rankin A. Milliken, Esq., from assisting plaintiff and his representatives in any way whatsoever in the litigation of this suit, and for other fur-

ther relief; and the Court having considered all of the moving papers, exhibits, affidavits and briefs in support and in opposition thereto, and having heard and considered all arguments of counsel; and the Court having filed its opinion dated June 14, 1971,

It is, on this 30th day of June, 1971

Ordered as follows:

1. Rankin A. Milliken, Esq., be prohibited from in any way disclosing, using, or providing access to confidential information received by way of his employment with Friden, Inc., and which was not disclosed to Plaintiff pursuant to written agreements during the 1964-65 period when Milliken was an employee of Friden, Inc.;

2. Rankin A. Milliken, Esq. be prohibited from communicating to anyone any information reasonably calculated to lead to the discovery of material which he may not have had access to, but the source of which was known through his employment relationship with Friden, Inc.;

3. The firm of Simon & Allen be prohibited from either requesting or receiving any information, ideas, etc. directly or indirectly from Rankin A. Milliken, Esq. which comes within the prohibitions of either Paragraph 1 or Paragraph 2 of this Order;

4. Any evidence obtained by either plaintiff or his representatives in violation of Paragraphs 1, 2 or 3 of this Order be considered unsuitable for submission by plaintiff to the jury;

5. The remainder of defendant's application be denied in its entirety.

/s/ LAWRENCE A. WHIPPLE
LAWRENCE A. WHIPPLE
United States District Court

We hereby consent to the form of the within Order.

RIKER, DANZIG, SCHERER & BROWN
Attorneys for Defendant

By /s/ DICKINSON R. DEBEVOISE
DICKINSON R. DEBEVOISE

APPENDIX D

Opinion of the Court of Appeals on Respondent's Motion to Dismiss the Appeal

November 2, 1971

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1835

GEORGE B. GREENE,

—v.—

THE SINGER COMPANY,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Submitted September 24, 1971

Present: VAN DUSEN, ALDISERT and GIBBONS,
Circuit Judges

OPINION OF THE COURT

SUR APPELLEE'S MOTION TO DISMISS

(Filed November 2, 1971)

ALDISERT, *Circuit Judge.*

Appellee's motion to dismiss this appeal requires us to decide whether the district court's order denying a petition

to disqualify one of appellee's lawyers in the trial of a patent case constitutes a final, and therefore appealable, order under the collateral rule enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Although a previous order of this court dated September 7, 1971, denied leave to appeal pursuant to provisions of 28 U.S.C.A. § 1292(b), the precise issue posited by this motion has not previously been before us.

The complaint charged the Singer Company with acts constituting unfair competition, violations of the antitrust laws, and patent infringement. Rankin A. Millikin, one of plaintiff's lawyers, had previously been employed as a patent attorney for Friden, Inc., a corporation subsequently acquired by defendant Singer. Defendant alleged that, while in Friden's employ, Milliken represented the company in the matter which is the subject of this law suit. The district court refused to disqualify Milliken from representing plaintiff, but did issue an order prohibiting Milliken from disclosing, using, or providing access to confidential information received by way of his employment with Friden.

The finality *vel non* of an order regulating an attorney's trial participation is not a question of first impression in other circuits. The Second and Ninth Circuits have held the *Cohen* rule inapplicable.[1] The Fifth Circuit, however, has found sufficient collateral finality to render such an order appealable.[2] We have decided that the approach followed by the Fifth Circuit is preferable here.

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[1] Fleischer v. Phillips, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959); Marco v. Dulles, 268 F.2d 192 (2d Cir. 1959); Willheim v. Murchison, 312 F.2d 399 (2d Cir. 1963); Cord v. Smith, 338 F.2d 516, 521 (9th Cir. 1964).

[2] Tomlinson v. Florida Iron & Metal, Inc., 291 F.2d 333 (5th Cir. 1961) and Uniweld Products, Inc. v. Union Carbide Corp., 385 F.2d 992 (5th Cir. 1967).

The question of the attorney's participation at trial was "not an ingredient of the cause of action and [did] not require consideration with it." *Cohen* v. *Beneficial Industrial Loan Corp., supra,* 337 U.S. 546-547. Thus, we may consider the second prong of the *Cohen* test: whether the matter "fall[s] in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546.

To require appellant to await a final judgment on the merits before testing the legality of the order denying the disqualification may, for practical purposes, deny it the reality of appellate processes. The precise question is whether the prohibitions imposed by the court order are sufficient to protect the interests of the defendant during the course of the trial. If, upon post-trial review, it were held that the safeguards imposed by the district court were too fragile to protect threatened interests, there could be damage inflicted upon the litigant for which the law would provide no practical remedy. Conversely, if the appeal goes forward now, prior to trial, the possibility of irreparable injury would be substantially lessened.

We do not hold that every ruling relating to conflict of interest by an attorney should activate the *Cohen* rule.[3] We decide only that these facts present a compelling

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[3] Every interlocutory order involves, to some degree, a potential loss. That risk, however, must be balanced against the need for efficient federal judicial administration as evidenced by the Congressional prohibition of piecemeal appellate litigation. To accept [a contrary] view is to invite the inundation of appellate dockets with what have heretofore been regarded as nonappealable matters. *Borden v. Sylk,* 410 F.2d 843, 846 (3d Cir. 1969).

argument that the "rights asserted in the action [are] too important to be denied review and too independent of the cause itself" to require a postponement of appellate consideration.

Accordingly, we hold that the June 30, 1971, order of the district court comes within the collateral rule doctrine of *Cohen* v. *Beneficial Industrial Loan Corp., supra,* and is a final, and, therefore, appealable order.

Appellee's motion to dismiss will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX E

Opinion of the Court of Appeals on the Appeal

March 13, 1972

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1835

GEORGE B. GREENE,

—v.—

THE SINGER COMPANY, a corporation of the State of New Jersey,

Appellant.

(D. C. Civil Action No. 1467-70)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued February 8, 1972

Before KALODNER, HASTIE and ROSENN, *Circuit Judges*

OPINION OF THE COURT

(Filed March 13, 1972)

PER CURIAM:

In the instant action for unfair competition, patent infringement and violation of the anti-trust laws, the de-

fendant Singer filed a motion to prohibit Rankin A. Milliken, Esquire, the plaintiff's patent attorney, from assisting the plaintiff and his representatives, in the litigation in this case, on the ground that Milliken, while in the employ of Friden, Inc., which had been acquired by Singer in 1963, had been assigned by Friden to represent Greene in certain patent applications in 1964-1965, respecting devices which were the subject of an Agreement between Friden and the plaintiff.

In support of its motion, Singer contended that some of the patent applications handled by Milliken are involved in the instant action.

The District Court entered an Order on June 30, 1971, limiting the role of Milliken in his representation of Greene but not prohibiting him from acting as co-counsel for Greene. This appeal followed.

On review of the records we are unable to say that the District Court abused its permissible discretion in its Order.

The Order will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
For the Third Circuit.

APPENDIX F

Judgment of the Court of Appeals

March 13, 1972

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1835

GEORGE B. GREENE,

vs.

THE SINGER COMPANY a corporation of the State of New Jersey,

Appellant.

(D.C. Civil Action No. 1467-70)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ..... DISTRICT OF NEW JERSEY

Present:

KALODNER, HASTIE and ROSENN,

Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ..... District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 30, 1971, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

THOMAS (illegible)
Clerk

March 13, 1972

APPENDIX G

Majority and Dissenting Opinions on Petitioner's Petition for Rehearing In Banc

May 10, 1972

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1835

GEORGE B. GREENE,

v.

THE SINGER COMPANY, a corporation of the State of New Jersey,

Appellant.

Before SEITZ, *Chief Judge,* and KALODNER, HASTIE, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN and ROSEN, *Circuit Judges.*

ON PETITION FOR REHEARING BEFORE THE COURT EN BANC

PER CURIAM:

The petition for rehearing filed by The Singer Company, a corporation of the State of New Jersey, appellant in the above entitled case, having been submitted to the judges

who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

Judges Van Dusen, Adams and Gibbons would grant the petition.

Dated: May 10, 1972

ADAMS, Dissenting Sur Order Denying Petition for Rehearing.

I dissent from the denial of rehearing.

From 1962 until 1965, Rankin A. Milliken was employed as a patent attorney by the Friden division of the Singer Company. During the last year of that employment, among his other duties, Mr. Milliken was assigned to prosecute the patent applications of George B. Greene with whom the Friden division had entered into an agreement for the development of fluid logic systems. When Mr. Milliken left Friden, he became Greene's patent attorney.

Mr. Milliken was retained in the present litigation to assist plaintiff's counsel on the patent aspects of the case. It is undisputed that some of the patents involved in this suit were the subject matter of Mr. Milliken's job at Singer while he was prosecuting Greene's patent applications. Although the circumstances surrounding Mr. Milliken's departure from Friden and subsequent work for Mr. Greene are extremely complex and give rise to certain extenuating

circumstances regarding his present representation, the Code of Professional Responsibility, EC4-5 makes clear that, "Care should be exercised by a lawyer to prevent the disclosure of confidences and secrets of one client to another, and no employment should be accepted that *might* require such disclosure." (emphasis added) (footnote omitted) This ethical consideration appears to have given status as a rule to ABA Opinion 165 (1936) which reads in part,

> "[A]n attorney must not accept professional employment against a client or a former client which will, or even may require him to use confidential information obtained by the attorney in the course of his professional relations with such client regarding the subject matter of the employment . . ."

In addition, the Standing Committee on Professional Ethics of the American Bar Association has stated:

> "[T]he lawyer should avoid representation of a party in a suit against a former client, where there may be the appearance of a conflict of interest or a possible violation of confidence, *even though this may not be true in fact.*" Informal Opinion 885 at 3 (emphasis added). *See generally,* Drinker, *Legal Ethics* 103-129 (1953).

The case law is also clear that a serious question is raised whenever a lawyer ceases to represent a client and brings a lawsuit against that client. And when the suit against the former client deals, in any way, with a period of time when the lawyer was representing the erstwhile client or with a matter that was under consideration while the lawyer was employed by the erstwhile client, the subject is even more grave.

As the Second Circuit noted in Consolidated Theaters v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954):

> "* * * The former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client." *Id.* at 924, *citing,* T. C. Theater Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268 (S.D.N.Y. 1953).

Thus serious doubts arise as to the propriety of Mr. Milliken's subsequent representation of Greene against Mr. Milliken's former client, Friden.

Because this case presents what appears to be a unique factual situation, and because an important question of legal ethics is implicated, I respectfully suggest that the court en banc should have considered the crucial issues involved. This would seem particularly appropriate at the present time when so many charges have been made concerning moral and ethical considerations affecting the bar.

Judges Van Dusen and Gibbons join in this dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX H

Canon 6

ABA Canons of Professional Ethics

Canon 6

Adverse Influences and Conflicting Interests

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

APPENDIX I

Canons 4 and 5

Rules 4-101 and 5-105

ABA Code of Professional Responsibility

Canon 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 (C) through an employee.

Canon 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.